IN THE

Supreme Court of the United States

October Term, 1967.

No. 61.

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

SUNRAY DX OIL COMPANY, et al.,
Respondents.

No. 97.

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

SUNRAY DX OIL COMPANY,
Respondent.

BRIEF FOR PETITIONER, THE UNITED GAS IMPROVEMENT COMPANY.

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BRIEF OF PETITIONER THE UNITED GAS IMPROVEMENT COMPANY.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Tenth Circuit (I R. 6696-57) to which the writ in No. 61 is di-

rected is reported at 370 F. 2d 181 (1966). The order of the Court of Appeals for the Tenth Circuit to which the writ in No. 97 is directed (II R. 6885-91) is reported at 376 F. 2d 578 (1967). The opinions and orders of the Federal Power Commission (herein called "Commission") reviewed by the Court of Appeals and involved in No. 61 (I R. 5768-804, 6030-38) are reported at 31 F. P. C. 623 and 1315 (1964). The opinions and orders of the Commission reviewed by the Court of Appeals and involved in No. 97 (II R. 6222-30, 6426-31) are reported at 36 F. P. C. 309 and 962 (1966).

JURISDICTION.

The judgment of the Court of Appeals involved in No. 61 was entered on December 9, 1966. The Petition for a Writ of Certiorari in No. 61 was filed on March 8, 1967 and was granted on October 9, 1967 (I R. 6927), — U. S. —. The judgment of the Court of Appeals involved in No. 97 was entered on March 27, 1967, rehearing denied May 18, 1967 (II R. 6921-25). The Petition for a Writ of Certiorari in No. 97 was filed on April 18, 1967 and was granted on October 9, 1967 (II R. 6930), — U. S. —. At the same time petitions for writs of certiorari filed by the Commission, the Public Service Commission of New York and other distribution companies, attacking the same judgment on similar grounds, were granted and the cases consolidated for argument (I R. 6926-28, II R. 6929-30), — U. S. —. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U. S. C. § 717r(b).

STATUTE INVOLVED.

The statutory provisions involved are § 7(c) & (e) of the Natural Gas Act, 52 Stat. 821 (1938), *as amended,* 15 U. S. C. § 717f. The relevant language of these subsections is as follows:

Extension of Facilities: Abandonment of Service.

Sec. 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations:

* * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pend-

ing the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

QUESTIONS PRESENTED.

These cases involve certificate applications by independent producers under § 7(c) of the Natural Gas Act. The issues now before this Court arise because the Commission, prior to hearing on these applications, issued *ex parte* temporary certificates to producers in Texas Railroad District No. 4, the area involved in these cases, at the very high unregulated prices contained in the producer-pipeline contracts. After the statutory hearing the Commission erroneously relied on these unregulated price levels in *ex parte* temporary certificates and other *ex parte* action to escalate the price level for the area required by the public convenience and necessity under this Court's decision in *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378 (*Catco*), from the 15¢ per Mcf the Commission had established in an earlier proceeding to 16¢ per Mcf. However, it did undertake pursuant to the direction of the Court of Appeals for the District of Columbia Circuit and rulings of this Court to determine whether refund of excesses above the new lawful price, collected under *ex parte* temporary certificates, was required in order to afford the consumer a complete bond of protection. On appeal by consumer representatives the Court of Appeals below affirmed the escalation of the "in-line" level. On cross appeal by producers the court held that the Commission lacked all power to order refund of unlawful excesses. In the meantime the Commission had held that partial refund of excesses had to be made. On a second appeal by producers, the court below vacated this refund order, relying on its prior decision. Therefore the questions presented are:

1. Does § 7 permit the Commission to issue a permanent certificate upon the condition that an applicant refund

amounts collected under *ex parte* temporary certificates above the lawful public convenience and necessity price during the pendency of the determination of such price?

2. Assuming § 7 permits the Commission to so condition permanent certificates, were the conditions reasonable in this case?

3. Did the Commission err in relying on temporarily certificated prices and other *ex parte* action to permit an escalation in the price level for District 4 above the level earlier found to be in line with other properly certificated sales in the area?

STATEMENT OF THE CASE.

These cases present important questions of the proper exercise of the Commission's authority to protect the consumer in the issuance of certificates of public convenience and necessity to independent producers under § 7 of the Natural Gas Act. The narrow issue raised by the present appeals is the Commission's power to condition such permanent certificates upon the refund by producers of unlawful excess money collected under *ex parte* temporary certificates during the protracted period when producer and consumer interests were litigating the question of the appropriate initial price level before the Commission. Two courts of appeals, those for the District of Columbia Circuit and the Tenth Circuit, have considered this issue and have reached directly opposite conclusions as to the Commission's power under § 7. However, as will be shown below, the Court of Appeals for the District of Columbia Circuit had opportunity to explore all sides of the important regulatory problems presented by the issuance of *ex parte* temporary certificates, and that court concluded that the Commission had full power to order refunds.

Sunray DX Oil Company and the ten other producer-respondents involved in Nos. 61 and 97 entered into contracts with various interstate pipelines during a period between October, 1960, and July, 1962, to sell gas from wells located in Texas Railroad District No. 4. The gas involved was to be (and eventually was) resold by the pipelines in interstate commerce. The initial prices proposed for these sales ranged from 15.9¢ per Mcf to 18¢ per Mcf. Instead of waiting for the issuance of permanent certificates, the producer-respondents applied for temporary certificates. These applications were made pursuant to that part of

§ 7(c) of the Natural Gas Act which confers on the Commission the power to "issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate. . . ." Universally, as in the present case, the allegations supporting the request for this authority do not cite examples of emergency conditions injuring consumers or threatening loss of gas to the interstate market. Rather, such applications allege only the possibility of economic problems for the individual producer itself.

All of the producer respondents here, relying on § 157.28 of the Commission's regulations, alleged one or more of the following emergency conditions calling for prompt Commission action:

> ". . . drainage, threatened loss of lease, flaring, [or] economic hardship resulting from payment of shut in royalties. . . ." (FPC Regs. § 157.28(c), 18 C. F. R. § 157.28(c)).[1]

In invoking § 157.28 of the Commission's regulations these producers necessarily acquiesced in the condition set forth

1. The implication of all such allegations is that if the producer does not receive the privilege of *ex parte* temporary certification it will suffer considerable economic loss. Therefore, far from conferring any "right" on the producer, the certificate constitutes a privilege, and any benefit over total loss which the producer enjoys under the temporary certificate must be measured against such total loss, not against benefits some other producers may enjoy. The allegations of threatened loss by the eleven producers involved in these refund cases can be found at: I R. 4115 (Sohio: "economic hardship"), 4126 (Sun: flaring, loss of lease), 4141 (Hunt: drainage), 4184 (Sun: drainage), 4193 (Texaco: "ill will" of lessor), 4206 (Sun: loss of lease), 4222 (Sunray: drainage), 2232 (Clark: drainage, shut-in royalties), 4249 (Sotex: drainage), 4332 (Sun: drainage), 4367 (Texaco: "ill will" of lessor), 4381 (Sun: drainage), 4398 (Coates: drainage, shut-in royalties, economic hardship), 4434 (Cox: drainage), 4479 (Humble: loss of lease), 4588 (Patchin: loss of contract, drainage).

in that section, which expressly states that any temporary certificate issues only:

> "pending final Commission action under sections 4 and 7 of the Natural Gas Act and without prejudice to such rate or *other condition as may be attached to the issuance of the certificate. . . .*" (Emphasis added).

While the temporary certificates issued to the producers here involved did not contain the word "refund," they each contained the following (or a substantially similar) provision:

> "This acceptance for filing shall not be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any finding or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company." (*E.g.*, I R. 4147, 4148, 4225, 4240-42, 4330)

These temporary certificates were, during the period involved in the present case, issued by a letter mailed by the Secretary of the Commission to the producer applicant (*E.g.*, I R. 4147). No public notice was given in the Federal Register or by other means which would enable a consumer representative as a practical matter to learn of the issuance of any such certificates. Moreover, these letter certificates were (and still are) issued in very large numbers. Consumer representatives including the United Gas Improve-

ment Company [2] and the Public Service Commission of the State of New York, who during this period were contesting the issuance of permanent certificates at out-of-line rate levels, likewise opposed the issuance of *temporary* certificates at equivalent out-of-line levels. These parties urged that whenever, pursuant to this Court's decision in *Atlantic Ref. Co. v. Public Service Comm'n,* 360 U. S. 378 (*Catco*) and other related decisions, the Commission conditioned a permanent certificate to a rate lower than that being collected under *ex parte* authority, it was necessary, in order to protect the consumer, also to condition the certificate upon refund of amounts already collected in excess of the legal conditioned rate level.

The crucial Commission decision passing upon this issue was one involving new sales in Texas Railroad District No. 4. *Skelly Oil Company,* 28 FPC 401, 1065 (1962). In *Skelly* the Commission held that although it might have power to order refunds in some cases, it was inequitable to do so in the case before it because the temporary certificates issued to the producers there involved did not contain the express word "refund" and therefore gave the producer no warning of potential liability.[3]

This aspect of the decision was appealed to the Court of Appeals for the District of Columbia Circuit by the New York Public Service Commission, The United Gas Improvement Company and Long Island Lighting Company.[4] The

2. Under an agreement with the City of Philadelphia, The United Gas Improvement Company operates the municipally-owned Philadelphia Gas Works and related facilities. The Gas Works distributed 1035 Btu natural gas to some 600,000 customers in the City of Philadelphia.

3. In the case of certificates which do contain the word "refund," the Commission orders refunds without further consideration of equities (II R. 6223, 36 F. P. C. at 309).

4. Several producers also appealed the aspect of the Commission order which reduced the rates they were collecting under tempo-

Court of Appeals reversed as to this aspect, holding that the mere absence of an express refund condition in a temporary certificate was not a sufficient equitable consideration to justify the denial of consumer protective refunds. *Public Service Comm'n v. FPC,* 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC,* 377 U. S. 963. It remanded for further proceedings, as the result of which the Commission ultimately ordered substantial refunds. *Skelly Oil Co.,* 35 F. P. C. 849 (1966)[5].

In the meantime there was a significant related development. As a result of the pressures generated by the above litigation, the Commission took the step of making a file of *ex parte* letter certificate orders available in its public reference room (however, it still published no notice of these). By special daily investigation the New York Public Service Commission discovered certain out-of-line certificates (involving South Louisiana sales) in this file within the statutory thirty-day appeal period after their issuance and appealed these *ex parte* orders also to the Court of Appeals for the District of Columbia Circuit. These letter orders were issued under the lead docket *J. Ray McDermott et al.,* 28 F. P. C. 563, 814, 1300 (1962). The *Skelly* appeal was pending at the same time and thus the District of Columbia Circuit was presented with all aspects of the regulatory problem of *ex parte* temporary certificates. *McDermott* and *Skelly* were heard by the same panel of judges within a month of each other and the decisions in the two were handed down within the same month. Each must necessarily be read in the light of

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rary certificates from 16¢ per Mcf to 15¢ per Mcf to be thereafter collected under permanent certification. This aspect of the Commission's decision was affirmed on appeal. *Public Service Comm'n v. FPC,* 329 F. 2d 242, 345-348 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil and Gas Co. v. F. P. C.,* 377 U. S. 963.

5. Producers have appealed this decision to the Tenth Circuit, further complicating the legal picture. *Skelly Oil Co. v. FPC,* CA 10 No. 9000 *et al.,* in abeyance pending the present appeal.

the other. The court held in *McDermott* that the Commission had power to issue temporary certificates by letter to producers, even at "out-of-line" prices, but only if such *ex parte* action was subject to complete review and adjustment at the time of permanent certification after hearing. *Public Service Comm'n v. FPC,* 327 F. 2d 893 (D. C. Cir. 1964). Then, in *Skelly,* the Court held that out-of-line temporary certificates were subject to adjustment by the ordering of refunds. *Public Service Comm'n v. FPC,* 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC,* 377 U. S. 963.

From the preceding history it can be seen that *McDermott* and *Skelly* graphically presented to the Court of Appeals for the District of Columbia Circuit the regulatory problem created by the use of emergency temporary certificates. First, if temporary certficates were to have any efficacy as emergency measures, the Commission had to be permitted discretion to issue them at once without a hearing. Compare 28 F. P. C. at 1305. However, so long as no hearing was permitted, the possibility could always exist (and in many cases did exist) that the price temporarily certificated would be one which would be unlawful and injurious to the consumer under this Court's decision in *Atlantic Ref. Co. v. Public Service Comm'n.,* 360 U. S. 378. This conflict of policies led inevitably to the sound practical resolution made by the Court of Appeals for the District of Columbia Circuit in these two cases. Implicit in the *McDermott* and *Skelly* decisions is recognition of the fact that if refund protection for the consumer is not available in the temporary certificate situation, there could easily be a return to the pre-*Catco* error of permitting unregulated entry of gas into the interstate market, subject only to later prospective adjustment. Without such refunds, *Catco* could be nullified by a shift

of the crucial Commission approval from the permanent to the temporary certification procedure, to the detriment of the consumer.

A final element completes the legal background of the present case. When the Commission in 1960 abandoned individual producer rate regulation and adopted an area approach, see *Wisconsin v. FPC*, 373 U. S. 294, it issued a Statement of General Policy setting forth, *inter alia*, certain so-called "guide-line" price levels for initial prices in various areas. Statement of General Policy, No. 61-1, 24 F. P. C. 818, issued September 28, 1960. This Statement was issued without notice or hearing and was not subject to court review. *Wisconsin v. FPC*, 292 F. 2d 753 (D. C. Cir. 1961).

Nonetheless it had a direct impact on the present proceeding. In the *Skelly* decision discussed above the Commission confined its 15¢ per Mcf price finding to a period prior to September 28, 1960. It severed out from *Skelly* four dockets involving contracts dated after the Statement and consolidated them with other certificate applications involving contracts also dated after that time (I R. 4636-40) to create the proceeding here under review. Petitioner and other consumer representatives intervened and the case was heard on the merits.

The Presiding Examiner's decision was issued on July 23, 1963 (I R. 5315-61). The Examiner, on the basis of the Commission's *Skelly* precedent (then not yet reversed by the Court of Appeals), refused to impose refunds of excesses collected under temporary certificates even though he found that temporary rates above 15¢ per Mcf were unlawful. Petitioner and other intervenors excepted to this decision. On January 24, 1964, the Court of Appeals for the District of Columbia handed down the *Skelly* decision and on March 23, 1964, the Commission issued its Opinion 422 in the present proceeding (I R. 5768-5804).

The Commission reversed the Examiner's refusal to order refunds and, relying on the Court of Appeals' *Skelly* decision, severed out and deferred decision on this refund issue pending the filing of briefs and possible evidence.[6]

Various producers appealed this refund ruling to the Court of Appeals for the Tenth Circuit which on December 8, 1966, reversed and held that:

> "[R]efunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition." (I R. 6743-44).

In issuing Opinion No. 422 the Commission noted that the *Skelly* decision called for a consideration of the question of whether refunds of amounts collected under temporaries could be ordered. However, it deferred decision on the issue and called upon the parties to submit briefs as to whether refund of unlawful excess money should be ordered or not (I R. 5798). The various parties responded and the Commission, accepting at their face value the allegations of facts made by the producers in these briefs, found that the public interest required the refund of all amounts collected in excess of the legal in-line level. However, the Commission excused repayment of unrecoupable sums paid for state taxes and for royalties prior to the date when the Court of

6. In this opinion the Commission also found, contrary to the contention of Petitioner and other intervenors, that the "line" for initial prices had risen from the 15¢ per Mcf found in the *Skelly* proceeding for the period before 1960 to 16¢ per Mcf for the period after. The Court of Appeals below affirmed this finding of a change in the line. Petitioner believes the decision of the Commission and the court to be erroneous as a matter of law. *Public Service Comm'n v. FPC*, 373 F. 2d 816 (D. C. Cir. 1967) *cert. granted*, Nos. 111 *et al.*, O. T. 1967 (reversing an identical escalation in the in-line level in Districts 2 and 3). As to this point Petitioner feels there is no reason to burden this Court by restating the Argument in the Brief of the New York Public Service Commission *et al.* which challenges the court below on this point.

Appeals' decision in the *Skelly* case put producers on notice that refunds might legally be ordered. Sunray DX Oil Company and the other producer respondents also appealed these orders to the Court of Appeals for the Tenth Circuit, which on March 27, 1967, set aside the orders summarily "on the authority of" its decision in the appeal from Opinion 422 quoted above (II R. 6885-91). The Court summarized its holding as follows:

> "We are committed to the principle that the Commission has no power to order refunds when the temporary certificate contains no express refund provisions."

Petitioners sought review of both the above decisions in this Court and certiorari was granted.

ARGUMENT.

I.

The Commission Has Full Power to Order Refund of Unlawful Amounts Collected Under Temporary Certificates.

The Court of Appeals for the District of Columbia Circuit properly construed § 7 of the Natural Gas Act in *Public Service Comm'n. v. FPC,* 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC,* 377 U. S. 963 ("Skelly"), in holding that the ordering of refunds of unlawful amounts collected under temporary certificates was a proper remedy available under § 7 of the Natural Gas Act. Its decision is fully consistent with the opinions of this Court requiring full protection for the consumer and the ordering of refunds to accomplish this end. *United Gas Improvement Co. v. Callery Properties,* 382 U. S. 223, 229; *Atlantic Ref. Co. v. PSC,* 360 U. S. 378. See also *Continental Oil Co. v. FPC,* 378 F. 2d 510, 529-32 (5th Cir. 1967), *cert. pending* Nos. 526 *et al.,* O. T. 1967.

The different conclusion reached by the Court of Appeals for the Tenth Circuit below was based on erroneous reasoning apparently derived from a failure to recognize the function of temporary certificates. For example that court states:

> "We believe that when a producer dedicates its gas to interstate sales it is entitled to know with some degree of certainty the conditions imposed *so that it may make an intelligent decision whether to accept or reject the certificate.*" II R. 6743 (Emphasis added).

The emphasized rationale overlooks the crucial fact that each of the producers here, in their sworn certificate appli-

cations to the Commission, alleged an emergency condition of drainage, loss of lease or payment of shut-in royalties (see footnote 1, p. 8 *supra*). Therefore, by their own representations, the producers were not in the situation contemplated by the court below, that of making a business choice between two price levels, say 15¢ and 18¢ per Mcf. Rather, they were, as the result of chance or previous business decisions, in an emergency situation in which the only alternatives were receiving *something* for the gas by an interstate sale (whatever the price) or *receiving nothing* and instead losing some or all of the gas through drainage, flaring, or loss of lease, or having to pay royalties in the absence of any income. It is solely because of these emergency circumstances that the Commission is permitted by law to grant the producer a temporary certificate at all.

The above consideration shows why the court's discussion of public interest questions such as adequacy of supply (II R. 6736) and price stability (II R. 6742) are misplaced and beside the point. Hearings under Sections 4, 5 and 7 of the Natural Gas Act are the forum in which the Commission weighs these public interest questions and decides whether, in a given case, consumer protection may best be preserved by affording a higher or lower price to a producer. Thus the "public convenience and necessity" and "just and reasonable" standards of these sections have given recognition to the fact that the legitimate interest of the producer and pipeline, that price stability and adequacy of supply, as well as the interest of the consumer, are to be considered in determining how best to accomplish the Act's primary purpose of consumer protection. The simple issuing of a temporary certificate for the *sole function* of "bailing out" an individual producer from a business emergency, without consideration of broader public interest questions, creates entirely different legal relationships. Refunds provide the

only mechanism for protecting the consumer under such circumstances.

Again the court erroneously notes:

> "For a period of several years the producers have sold their gas without warning that refunds would be required upon the grant of a permanent certificate." II R. 6743.

However, as early as January of 1962, the Commission announced in its landmark decisions in *Catco*-on-remand, *Continental Oil Company*, 27 FPC 96 (1962), that refunds could be ordered under unconditioned temporary certificates. In that decision the Commission stated at 110:

> "With respect to the unconditioned temporary certificate issued to Atlantic in Docket No. G-15374, the refund provision is likewise applicable. The temporary certificate gave no unalterable right to the proposed price. Under Section 7(c) the Commission may issue a temporary certificate in case of emergency pending the determination of an application for a certificate. This appears to contemplate a continuous course of adjustment until the time that a final order determines the conditions under which a permanent certificate shall be issued."

Moreover, long before the contracts here at issue were entered into and the temporary certificates for them issued by the Commission the position of petitioner and other distribution companies as to the proper "in-line" initial price for Railroad District No. 4 and the fact that refunds would be sought were fully spread upon the record in the *Skelly* proceeding, *Skelly Oil Co., et al.*, Docket No. G-18638, *et al.* Ample notice existed and afforded producers full opportunity to protect their interests.

Finally, the court below errs in construing the language set forth at p. 9 above and contained in each certificate issued to these producers as limited solely to prospective adjustments by the Commission (II R. 6740). Nothing in the language suggests such an interpretation. Rather, the language specifically disavows any "approval of any rate [or] charge . . . ." It likewise disavows "recognition of any claimed contractual right or obligation . . ." associated with the proposed sale, and, as noted above, Section 157.28 of the Commission's Regulations, under which these temporaries were sought and issued, indicates that they must be issued "without prejudice to such . . . condition as may be attached to the issuance of the certificate. . . ." Given the basic duty of the Commission to protect the consumer interest, especially in an *ex parte* situation, it was clearly error for the court to read a restriction into the language of these letter orders which does not appear from their plain meaning and which could serve only to permit producers to retain unlawful excess rates at the expense of the consumer whom the Act was designed to protect. Both the District of Columbia Circuit in its *Skelly* decision, *supra*, and the Fifth Circuit in its recent decision in *Continental Oil Co. v. FPC*, 378 F. 2d 510, 532 (5th Cir. 1967), *cert. pending* Nos. 526 *et al.*, O. T. 1967, concluded, in the words of the Fifth Circuit:

> "Whether or not this is characterized as 'boiler plate' language it was sufficient in our opinion to put the Producers on notice of the possibility that refunds of excessive amounts might ultimately be required. . . ."

This Court in *United Gas Improvement Co. v. Callery Properties*, 382 U. S. 223, recently ruled on the power of the Commission to order refunds and that ruling is con-

sonant only with the decision of the District of Columbia Circuit in *Skelly*. Implicitly it rejected the reasoning of the court below. In *Callery* this Court was unanimous in holding that:

> "The Commission could properly conclude that the public interest required the producers to make refunds for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest." 382 U. S. at 229.

The general legal proposition underlying this conclusion was the Court's holding that:

> "an agency, like a court, can undo what is wrongfully done by virtue of its order." *Ibid.*

This principle applies squarely to the present case. Here the "wrong" done by virtue of the Commission "order" was its permitting of sales of gas in interstate commerce at illegally high rates which would be passed along to the consumer pending a hearing on whether the public interest in fact required such sales or such high rates.

Callery can hardly be distinguished from the present case on the ground that *Callery* involved permanent certificates issued after hearing, from which a timely appeal was taken with an ultimate reversal, whereas the case at bar involves temporary certificates not reviewed by a court. Rather, *Callery* presented a more difficult case since there the Commission had held a full hearing before issuing *permanent* certificates, and the court did not stay those certificates. In the present case, however, neither the Commission nor a court had ever had an opportunity to scrutinize the price levels and determine whether they were legal prior to the time the consumer was obliged to begin

paying them. And, moreover, the Commission regulations make clear that a temporary certificate, because of the emergency circumstances of its issuance, is entirely tentative. Thus it is as subject to revision as were the permanent certificates in *Callery* which were appealed to the courts. In the present case the appeal was originally not to the courts but to the Commission at the time of hearing on the permanent certificates and this was the first time that consumer representatives had an opportunity to intervene and contest the temporary certificates, until ultimately the Commission reversed its earlier *ex parte* orders and issued permanent certificates at lower rates. In both cases the governing legal principles are the same—the rectifying of certificates issued to producers by the Commission under erroneous principles of law which never became final but were ultimately corrected by the Commission.

II.

The Decision of the Commission Herein to Order Partial Refunds Was a Proper Exercise of Its Discretion and Should be Affirmed.

Because the Court of Appeals for the Tenth Circuit ruled that the Commission lacked all power to order refunds of unlawful amounts collected pursuant to temporary certificates in its decision under review in No. 97, it did not reach the issue, presented by the appeals of the producers, of whether (assuming refund power) the Commission abused its discretion in ordering partial refunds from the present respondents. However, this Court clearly has authority to review this issue, as it has done in a number of previous FPC cases, without remand to the court below for initial consideration. See *United Gas Improvement Co. v. Callery Properties,* 382 U. S. 223, 229, 231; *United Gas Improvement Co. v. Continental Oil Co.,* 381 U. S. 392, 404-05;

FPC v. Southern California Edison Co., 376 U. S. 205; *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division,* 358 U. S. 103, 114. The exercise of this power by this Court has been peculiarly appropriate in cases involving Federal Power Commission regulation because of the great delay frequently encountered in such proceedings, delay which inevitably works to the detriment of the consumer. This element of delay is particularly acute in the present case which was originally instituted in September of 1962 and which, after a number of delays, unsuccessfully resisted by consumer representatives (see, *e.g.*, Order Denying Motion to Expedite Proceedings, 30 FPC 681 (1963)), was not ultimately resolved on the refund question until December of 1966. Moreover, this case became probably the most litigated gas case in the courts of appeals. See *Amerada Petroleum Corp. v. FPC,* 338 F. 2d 808 (10th Cir. 1964); *Sunray DX Oil Co. v. FPC,* 351 F. 2d 395 (10th Cir. 1965); *Long Island Lighting Co. v. FPC,* CADC No. 18622, appeal dismissed July 14, 1964 (unreported). While the present case deals with refunds, rather than prospective rates, this Court has noted the serious injury to the consumer which can flow from delay in ordering refunds. *FPC v. Tennessee Gas Transmission Co.,* 376 U. S. 145. The Commission's decision under review in No. 97 was based on the factual allegations of producers accepted at their face value and rejected or accepted as a matter of law. Therefore there is no factual dispute and the issue is peculiarly appropriate for review at the present time.

The Commission was bound to make its decision on the basis of the "equities." *Public Service Comm'n. v. FPC* 329 F. 2d 242 (D. C. Cir. 1964). In that case the court held that the mere fact that a producer might, as a practical matter, have failed to anticipate the possibility that unlawful amounts collected under temporary certificates might be

ordered refunded was insufficient as a matter of law to excuse the producers from paying such refunds. The basic issue before the Commission, therefore was a balance between the often declared purpose of the Act to offer the consumer a complete, permanent and effective bond of protection—a purpose which would require the ordering of full refunds—and the particular circumstances of a given producer which might create a hardship outweighing this statutory purpose. Compare, *Skelly Oil Co.,* 35 F. P. C. 849 (1966). This *Skelly* opinion was the first Commission opinion to order refunds under temporaries and it posed the issue as follows:

> "In reaching this result [the ordering of refunds], we begin with the proposition that the overriding purpose of the Natural Gas Act is the protection of the gas consuming public, as the courts have emphasized time and time again. With this in mind, it is helpful to know just how the sums subject to refund came into existence. The producers here were initially granted temporary authorization to make sales in interstate commerce at the rates they requested. This was done on an ex parte basis, and no interested party was given notice or an opportunity to present its views to the Commission. Nevertheless, the temporary authorization granted in each case specifically indicated that it could not be construed as approval of any rate and is granted without prejudice to such final disposition of the certificate application as the record may require. In most of the cases, this expedited treatment was justified on the basis that the producer would otherwise experience an economic hardship of one sort or another. Only two cases posed a threat of loss of gas to the interstate market, in contrast to the interest of a private party. This procedure continued long after it was

widely known that certain interested parties, notably the New York Public Service Commission, protested the initiation of any sales from this area at an initial rate of more than 14.6 cents per Mcf." 35 F. P. C. at 8.

The same basic issues are posed by the present case. Only one of the producers here alleged a possible loss of gas through flaring in its request for *ex parte* emergency relief. All the others alleged circumstances which would have led only to a total loss for the producer, without necessarily a concomitant loss to the interstate consumer.[7]

Most of the reasons advanced by producers for retaining these excess sums (the reasons are summarized in the Commission's Opinion at II R. 6225-26) are of a general policy nature and deal broadly with the impact of ordering refunds upon the producing industry as a whole (see, *e.g.*, II R. 6464-80). It was clearly correct for the Commission to conclude that producers who had invoked emergency provisions to save themselves from complete financial loss could not equitably be excused from individual refunds on the basis of policy considerations which must be industry-wide in their scope and impact in order to have significance. This *ad hoc* regulatory conflict, arising essentially from the Commission's failure, between 1959 and 1964, to protect the consumer adequately with conditions in temporary certificates, had to be resolved on the basis of considering individual cases. In the absence of allegations by the producers of individual hardship, the Commission was justified in rectifying its earlier errors by ordering refunds. The Commission did find that the payment of unrecoupable state taxes and of royalties based on the illegally high sales price for given gas constituted an excusable outlay by the producers who may have relied

7. See footnote 1, p. 8 *supra*.

on the price level permitted in the temporary certificate. Therefore, to the extent that these payments were in fact unrecoverable, the producer was not required to make a refund thereof.[8]

The Commission's resolution of this matter constitutes a proper exercise of its duty under the Natural Gas Act to afford a complete bond of protection to the consumer. And it correctly ordered the immediate payment of refunds, for as this Court said in the *Callery* decision:

> "We think that the Commission could properly measure the refund by the difference between the rates charged and the 'in-line' rates to which the original certificates should have been conditioned. The Court of Appeals would delay the payment of the refund until the 'just and reasonable' rate could be determined. We have said elsewhere that it is the duty of the Commission, 'where refunds are found due, to direct their payment at the earliest possible moment consistent with due process.' FPC v. Tennessee Gas Transmission Co., 371 U. S. 145." 382 U. S. at 230.

While it could well be argued that refunds herein should have been ordered much earlier, it cannot be maintained that there is now any reason or excuse for further delay.

8. Since the excusing of these refund and royalty amounts was based on a theory of reliance, the Commission properly concluded that they could not be excused subsequent to the date of the decision in the Court of Appeals in the *Skelly* case, 329 F. 2d 242, which was issued in January of 1964.

CONCLUSION.

For the foregoing reasons it is urged that the opinion of the court below to which the writ in No. 61 is directed be reversed insofar as it affirmed an escalation of the in-line price and held that the Commission lacked power to order refunds of excess amounts collected under temporary certificates. Likewise, the opinion of the court below to which the writ is directed in No. 97 should be reversed for applying the court's earlier holding that the Commission lacked power to order such refunds, and Opinion 501 of the Commission ordering partial refunds of unlawful amounts collected above the in-line level should be affirmed.

Respectfully submitted,

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